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No. 04-899

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2004

ATTICA CENTRAL SCHOOL, *Petitioners*

v.

J.S., *et al.*, *Respondents*

**On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit**

## MOTION AND BRIEF *AMICI CURIAE* OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

The National School Board Association and its joint *amicus* respectfully move this Court to grant them leave to file the attached brief *amici curiae* in this case. Petitioners have consented to the filing of this brief. A letter attesting to their consent has been submitted to this Court. Respondents have refused to consent.

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, together with the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members, who govern the 14,722 local school districts that educate forty-seven million public school students.

The New York State School Boards Association, Inc. (NYSSBA) is a not-for-profit membership organization and under New York law has a statutory responsibility to devise "practical ways and means for obtaining greater economy and efficiency in the administration of school district affairs and projects." NYSSBA represents approximately six hundred ninety-five (695) of seven hundred and forty-two (742) public school districts in New York State, or approximately, ninety-four percent (94%) of all New York public school districts.

NSBA and NYSSBA have a strong interest in the proper implementation of the Individuals with Disabilities Education Act (IDEA) and its regulations, and in the proper role of public school districts in implementing the IDEA. NSBA and NYSSBA have

participated as *amicus curiae* in many education cases reviewed by this Court.

This case raises important jurisdictional issues in cases brought under the Individual with Disabilities Education Act that affect all school districts that receive federal funds for special education. They are obligated to comply with both the substantive and procedural requirements of the IDEA and therefore have a substantial interest in ensuring the courts exercise jurisdiction in manner consistent with their obligations under the law and with the overall statutory purpose of ensuring that children with disabilities receive a free appropriate public education through individual education plans developed in a collaborative process between parents and schools.

For these reasons, *amici* request the opportunity to advise this Court on the need for clarity on this issue so that school districts may carry out their responsibilities under the IDEA without the undue threat of litigation that bypasses the comprehensive remedial scheme established by Congress.

Respectfully submitted,

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Petitioners consent to the filing of this brief. Their consent is on file with this Court.[1]

## INTEREST OF THE *AMICI*

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, together with the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members, who govern the 14,722 local school districts that educate forty-seven million public school students.

The New York State School Boards Association, Inc. (NYSSBA) is a not-for-profit membership organization and under New York law has a statutory responsibility to devise "practical ways and means for obtaining greater economy and efficiency in the administration of school district affairs and projects." NYSSBA represents approximately six hundred ninety-five (695) of seven hundred and forty-two (742) public school districts in New York State, or approximately, ninety-four percent (94%) of all New York public school districts.

NSBA and NYSSBA have a strong interest in the proper implementation of the Individuals with Disabilities Education Act (IDEA) and its regulations, and in the proper role of public school districts in implementing the IDEA.

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[1] This brief was written by the National School Boards Association (NSBA), which is *amicus curiae* before this Court, and not in any part by counsel for either party. No person or entity other than NSBA has made a monetary contribution to the preparation or submission of this brief.

## QUESTION PRESENTED

Are plaintiffs who allege systemic violations of the Individuals with Disabilities Education Act by a local school district, and not the State, automatically exempt from the exhaustion of administrative remedies requirement contained in 20 U.S.C. § 1415(i), (*l*) (2000)?

## STATEMENT OF THE CASE

Six students on behalf of themselves and other similarly situated students sued the Attica Central School District, alleging that various district policies, procedures, practices, and customs violate the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (2000), and other federal and state special education laws. The plaintiffs did not allege that Attica's administrative procedures themselves were defective or unavailable to them. Nor did they allege that such procedures would be inadequate to address the asserted violations. In fact, two of the plaintiffs had requested due process hearings over issues related to their individual educational programs (IEPs) on which settlements were ultimately reached. The requests for hearing and settlement negotiations did not raise any of the issues asserted by the plaintiffs in court. The remaining plaintiffs did not pursue any administrative remedies whatsoever.

Attica responded to the lawsuit by filing a motion to dismiss based on lack of subject matter jurisdiction, since the plaintiffs had failed to exhaust their administrative remedies as required by the IDEA. Although the district court did not accept the plaintiffs' contention that their failure to exhaust was excused by

a "class action" exception,[2] it nevertheless denied the motion, finding that requiring exhaustion would be futile in this case. On interlocutory appeal, the Second Circuit affirmed the district court's decision, based largely on the fact that plaintiffs' claims involved alleged systemic violations, rather than a challenge to an individual child's individualized educational program (IEP). While the court recognized some of the purposes underlying the exhaustion requirement, it did not explain why enforcing the requirement in this case would not serve any of those purposes. Nor did it discuss—other than invoking the "systemic" characterization—how the rationales set forth by other courts for excusing exhaustion applied to the claims asserted here.

## SUMMARY OF THE ARGUMENT

This Court's review of the decision below is crucial to ensuring that courts have uniform criteria for determining their jurisdiction in cases in which plaintiffs allege systemic violations under the IDEA without first exhausting their administrative remedies. The Second Circuit's ruling illustrates how conflicting precedent on this issue undermines important statutory goals by leading courts to allow plaintiffs to circumvent the comprehensive remedial process Congress established to ensure that children with disabilities receive a free appropriate public education (FAPE) as expeditiously as possible. *Amici* urge this Court to accept review of this case and to establish rigorous standards for determining when exhaustion

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[2] The court has not granted plaintiffs' request to certify the class.

may be excused that recognize this important goal and that promote congressional intent that courts serve as the forum of last resort in resolving disputes under the IDEA.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT'S RULING IS NECESSARY TO PREVENT UNNECESSARY LITIGATION ON A ISSUE OF FEDERAL COURT JURISDICTION UNDER A PROVISION MEANT TO LIMIT JUDICIAL INVOLVEMENT IN SPECIAL EDUCATION MATTERS.

#### A. Federal court jurisdiction under the IDEA is not uniformly determined in a manner consistent with the statutory scheme of the Individuals with Disabilities Education Act.

The IDEA is applicable to all public schools in the approximately 15,000 school districts that receive federal funds. These schools serve over 6.3 million children aged 3-21 with disabilities by providing them a free appropriate public education (FAPE). U.S. Department of Education, *24th Annual Report to Congress on Implementation of the IDEA*, A-1 (2003).

The IDEA emphasizes early resolution, cooperation and use of administrative procedures, not court intervention, to work out disputes. Review of the Second Circuit's decision in this case is essential to ensuring that all determinations of federal court jurisdiction in IDEA cases are made consistent with this statutory scheme.

The IDEA strongly favors early, non-judicial resolution of disputes between parents and schools on an individual basis. The statute provides a comprehensive scheme that includes expansive procedural protections for parents and the availability of administrative proceedings when differences remain after attempts at informal resolution fail. 20 U.S.C. §§ 1413-1415 (2000). Parents must be notified whenever the school district intends to evaluate or change the placement of their child. In addition, parents have the right to be included in the decision-making process. *Id.* at § 1413(f). Parents must be given the opportunity to serve on the team that develops a student's IEP along with input from educators and health professionals. *Id.* at § 1414(d)(1)(B)(i). Parents have the right to disagree with the school district's evaluations and seek an outside, independent evaluation at the school district's expense. *Id.* at § 1415(b)(1); 34 C.F.R. § 300.502(b)(2)(ii) (2000).

These procedural safeguards are accompanied by the opportunity for mediation of disputes, 20 U.S.C. § 1415(e), and the right to pursue administrative relief through a number of different avenues. Section 1415(f) requires states to establish administrative procedures for impartial due process hearings for complaints received about any "matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* at § 1415(b)(6). The IDEA regulations also require the states to establish complaint resolution procedures for individuals to assert non-compliance with IDEA procedures. The procedures must include independent on-site investigations by the state, opportunity for submission

of information by the complainant, review of all information by the state and the issuance of a written decision. If a violation is found, the state may order corrective actions to achieve compliance including the "appropriate provision of services for all children with disabilities." 34 C.F.R. §§ 300.660-.662 (2000). These regulations are consistent with the statutory provisions placing primary responsibility on the states for ensuring that school districts comply with IDEA requirements. 20 U.S.C. § 1412 (2000).

This Court has recognized the importance of parental involvement and administrative procedures to the proper functioning of the IDEA. In *Smith v. Robinson*, 468 U.S. 992, 1011-12 (1984), this Court declared that Congress clearly did not intend to permit the circumvention of these cooperative and administrative mechanisms by suing under other laws:

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA [predecessor of the IDEA] and Congress' express efforts to place on local and state educational agencies the local and state responsibility for developing a plan to accommodate the needs of each handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate education. Not only would such a result render superfluous most of the detailed procedural protections outlined in the statute, but more important, it would also

> run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan. . .No federal district court presented with a constitutional claim to a public education can duplicate that process.

Although Congress did respond to the *Smith* decision by amending the IDEA to clarify the interrelationship between that Act and other federal laws, in doing so, it clearly reaffirmed the requirement that complainants must first exhaust the administrative remedies available under the IDEA before going to court, if the claim could have been brought under that law. 20 U.S.C. § 1415(l)(2000).

In its latest amendments to the IDEA, Congress again signaled its intent that parents and schools seek to resolve their differences informally and avoid adversarial proceedings, if at all possible. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446 (2004). The new law, which takes effect on July 1, 2005, requires in addition to the opportunity for mediation, that the parents and relevant members of the IEP Team participate in a "resolution session" before a due process hearing can be held. The purpose of the session is to allow the parents to discuss their complaints and the facts that form the basis of the complaint and to provide an opportunity for the school district to resolve the complaint. *Id.* at § 615(f)(1)(B). If mediation or the resolution session fails to resolve the complaint, an impartial due process hearing may occur at which the party requesting the hearing may raise

only those issues of which it has provided prior written notice. *Id.* at § 615(f)(3)(B).

Thus, Congress has made clear and, in fact, has reaffirmed several times, its intent that issues over the provision of a free appropriate public education to children with disabilities be discussed and resolved through a collaborative process and, if necessary, through alternative dispute resolution or administrative proceedings. Given this plain legislative intent, exceptions to the exhaustion requirement that allow these procedures to be bypassed should be granted only sparingly in cases where pursuing those remedies would truly be futile or inadequate as determined by uniform criteria established by this Court.

### B. The failure of the federal courts of appeals to establish and apply uniform criteria for deciding the applicability of the exhaustion requirement to cases asserting systemic violations under the IDEA frustrates critical statutory goals.

The parties do not dispute that exhaustion of administrative remedies is the rule under the IDEA unless one of several judicially created exceptions applies, there being none specified by the statute. The exhaustion requirement is crucial to ensuring that dispute resolution under the IDEA proceeds according to the statutory scheme set forth by Congress and to avoiding undue and premature judicial intervention. By specifically incorporating the exhaustion of administrative remedies requirement into the IDEA, Congress clearly signaled its intent that agencies with

substantive expertise, not the courts, "have primary responsibility for the programs that Congress charged them to administer." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (quoted in *Moubry v. Independent School Dist.*, 9 F. Supp.2d 1086 (D. Minn. 1998)). Courts have recognized that this means of dispute resolution serves several important purposes including exercise of agency expertise to correct errors, development of a factual record prior to judicial review, prevention of circumvention of agency procedures and avoidance of unnecessary judicial review. *E.g., Bills v. Homer Consolidated Sch. Dist. No. 33-CU*, 959 F. Supp. 507, 511 (N.D. Ill. 1997).

These purposes are particularly important in the context of special education. This Court has recognized that schools have the expertise to make the educational judgments about how best to provide FAPE and that courts should hesitate to interfere with those decisions. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 207-08 (1982). These administrative processes help ensure that when disputes do arise between parents and schools, they are resolved expeditiously so that children with disabilities receive FAPE as soon as possible without being subject to the inherent delays and inertia of judicial proceedings. To ensure this, the statute provides very specific timelines for hearings to take place, decisions to be rendered, and appeals to be perfected. The administrative processes also help school districts to focus on serving the educational interests of children by identifying problems that can be corrected without unnecessarily incurring the costs, in monetary and staff resources, of court intervention.

When an exception to the exhaustion requirement could undercut these critical purposes, it should be granted only when necessary to promote the primary statutory goal of providing FAPE to children with disabilities. Under these circumstances, exceptions should be clearly delineated, uniform across all jurisdictions, and impervious to abuse of process.

Because none of these conditions exists under the current confused state of the law, only review by this Court can bring about the clarity and consistency needed on this issue. As petitioners have demonstrated, lower federal courts have reached divergent opinions on how to apply the exhaustion requirement to claims asserting "systemic" violations. *Compare Hope v. Cortines*, 69 F.3d 687 (2d Cir. 1995), *aff'g* 872 F. Supp. 14 (E.D.N.Y. 1995) (holding that conclusory allegations that *local* school district engaged in widespread, discriminatory practices and actions contrary to the IDEA does not excuse exhaustion requirement because state should first be given opportunity to rectify errors through administrative process); *Hoeft v. Tucson Unified School District*, 967 F.2d 1298 (9th Cir. 1992) (same); *with Beth V. v. Carroll*, 87 F.3d 80, 88 (3d Cir. 1996) (holding that plaintiffs may thus be excused from the pursuit of administrative remedies where they allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process); *Association for Community Living in Colorado v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) *citing New Mexico Association for Retarded Citizens v. State*, 678 F.2d 847 (10th Cir. 1982) (same).

Divergent outcomes have occurred not only among the circuit courts of appeals that have ruled on

the issue, but also within circuits, as is the case here. *Compare Hope v. Cortines*, 69 F.3d 687 (2d Cir. 1995) *with J.G. v. Board of Education of Rochester City School District*, 830 F.2d 444 (2d Cir. 1987) (holding that attorneys for class action plaintiffs who reached settlement with local school district to remedy systemic violations under the IDEA are entitled to fees since settlement achieved remedies far beyond any relief available under administrative proceedings; plaintiffs were not required to exhaust before bringing suit). This divergence highlights the need for this Court to set forth a uniform framework for resolving this issue that will provide the consistency necessary to a fair and comprehensible implementation of the federal mandates imposed by the IDEA.

### C. The disarray of jurisdictional jurisprudence under the IDEA imposes significant legal difficulties on school districts and courts in cases alleging systemic violations.

Due to the disarray of court decisions on the applicability of the exhaustion requirement to cases asserting "systemic" violations, determining a prudent legal strategy that best serves the purposes of the IDEA becomes more complicated for school districts and their legal counsel than just assessing the strength of the plaintiffs' substantive claims. Currently, school districts sued for alleged "systemic" violations of the IDEA never brought before an administrative panel must opt for one of three responses: 1) defend on the merits in expensive and prolonged litigation that may be brought as a class action; 2) raise the exhaustion requirement jurisdictional defense in sometimes long-

drawn-out court battles subject to uneven and inconsistent judicial understanding and application of the defense;[3] or 3) regardless of the merits of the plaintiffs' claims, accede to a settlement that may avoid the time and expense of litigation but may entail far reaching conditions the district must meet under extensive supervision and monitoring by an outsider, often the plaintiffs' attorney.

These determinations should not depend, as they currently do, on the judicial circuit in which the local school district happens to be located. A decision by this Court would not necessarily change the legal choices open to school districts in every situation but would help set a clearer standard that would minimize the amount of time and resources spent on resolving jurisdictional issues and would refocus the proceedings—judicial or administrative—on whether the school district has properly met its obligation to provide FAPE to children with disabilities.

The lack of uniform criteria has led courts to make jurisdictional decisions not in keeping with IDEA's purposes. Currently, they are forced to navigate a maze of conflicting precedent from among the circuits as well as divergent opinions from their own courts. The Second Circuit's ruling illustrates the problems that this can cause. The court cites several decisions from its own jurisprudence, but instead of applying the common elements the court is able to discern in the cases that excused the exhaustion requirement, it only explains how the case before it differs from one decision that enforced the

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[3] This case itself has been before the courts for five years with the jurisdictional issue still unresolved.

requirement. The court's analysis on this front suggests that as long as plaintiffs do not challenge the content of a particular IEP but do include allegations of some "systemic" violations by the school district, they are not required to exhaust administrative remedies.

These criteria are particularly troubling because they threaten to frustrate the congressional intent that courts serve as tribunals of last resort in IDEA cases by elevating form over substance. Instead of giving due weight to the substantive purposes underlying the exhaustion requirement, they permit plaintiffs to sidestep Congress' carefully crafted administrative scheme merely by characterizing their complaints of procedural defects and failure to provide FAPE as systemic. Simply alleging a systemic violation should not be the key to opening the courthouse door without first following the administrative pathways created by Congress.[4]

*Amici* urge this Court to grant review in this case and to set forth concrete criteria that will ensure that all federal courts determine their jurisdiction over claims

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[4] For example, this Court has noted that the burden of demonstrating the futility or inadequacy of administrative remedies rests with the party seeking direct access to court. *Honig v. Doe*, 484 U.S. 305, 327 (1988). The Second Circuit recognized that plaintiffs bear this burden, but did not analyze whether the district court erred in not requiring the plaintiffs to meet this burden. In fact, the district court rejected the plaintiffs' argument that they were excused from the exhaustion requirement by the "class action exception" and went on to rule, based on its own reasoning, that plaintiffs' case met the futility exception. Another court has suggested that plaintiffs' burden includes showing that the purposes underlying the exhaustion requirement would not be served by enforcing it under the circumstances of their particular case. *Hoeft*, 967 F.2d at 1304.

of systemic IDEA violations in the same manner. *Amici* respectfully suggest that in doing so, this Court should take into account the different considerations applicable to systemic violation claims brought against local school districts, as opposed to against state agencies, and identify the factors that distinguish allegations of systemic violations susceptible to administrative remedies from those for which the pursuit of such relief is, in fact, futile. For example, in *Doe v. Arizona Department of Education*, 111 F.3d 678, 681 (9th Cir. 1997), the court stated that:

> A claim is "systemic" if it implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself...it is not "systemic" if it involves only a substantive claim having to do with limited components of a program, and if the administrative process is capable of correcting the problem.

*See also, Pihl v. Massachusetts Department of Education*, 9 F.3d 184, 190-91 (1st Cir. 1993) (holding that exhaustion is not required where agency prevents the litigant from pursuing the administrative process); *Hoeft*, 967 F.2d 1298, 1305 (holding that exhaustion is required in cases challenging district policies and practices unless solely questions of law are at issue and agency expertise and administrative record therefore are unnecessary).

## II. THIS COURT'S REVIEW IS CRITICAL TO CURBING UNNECESSARY JUDICIAL INTERVENTION INTO EDUCATIONAL DECISION-MAKING.

Despite the IDEA's preference for informal or administrative resolution of issues over the provision of FAPE to children with disabilities and this Court's repeated admonitions that the judiciary is ill equipped to deal with matters of educational policy and decision-making, federal and state court involvement in special education disputes has grown over the past three decades, unlike other types of school litigation that actually decreased during this same period. *See* P. Zirkel & S. Richardson, *The Explosion in Education Litigation*, 53 EDUC. L. RPTR. 767, 779-781 (1989); P. Zirkel & A. D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. RPTR. 731, 733-34 (2002). In fact, for the period from 1977 to 2000, more than 58% of all court decisions in special education cases came in the last eight years.

*Amici* do not suggest that courts have no role in special education disputes as the IDEA plainly provides aggrieved parties the right to judicial review. But Congress clearly circumscribed this right by requiring complainants to exhaust the administrative remedies carefully laid out in the statute. This Court's review of the decision below is necessary to preserve the integrity of that requirement and the purposes it serves. As more courts are confronted with cases asserting systemic violations by local districts,[5] it is

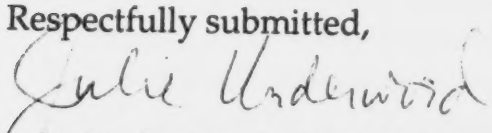
[5] A scan of the Internet reveals that special education advocates are pursuing and promoting class actions, case aggregation and impact

important that they know how to determine their jurisdiction when the plaintiffs have not first sought administrative relief. This Court's ruling would provide the certainty that courts and the education bar need on this issue, thereby decreasing litigation spent on interpreting the exhaustion requirement and reducing inappropriate intervention by courts when jurisdiction does not exist.

## CONCLUSION

For the reasons explained above, *Amici* urge this Court to accept review of this case.

Respectfully submitted,



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litigation as legal strategies to assert the rights of children with disabilities so that courts will continue to be faced with such cases and the jurisdictional issues they raise. *See, e.g., Reinholdson v. State of Minnesota*, (posting a class action complaint), *available at* http://www.kerrlaw.com/news/classaction.htm; *Education-A-Must: Parent Workshops*, (promoting a workshop featuring a session on systemic advocacy), *available at* http://www.education-a-must.com/workshops.html; *About Disabilities Rights Center*, (describing impact and class action litigation as part of the mission of the New Hampshire Disability Rights Center), *available at* http://www.drcnh.org/aboutus.htm.